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CASE NO. 86 - ____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1986

NATHANIEL ATCHISON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

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QUESTION PRESENTED

WHETHER PETITIONER WAS CONVICTED ON EVIDENCE WHOLLY INSUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner, Nathaniel Atchison, requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia in Atchison v. State, 181 Ga. App. 351, 352 S.E.2d 201 (1986).

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Georgia rendered on December 3, 1986 is reported at 181 Ga. App. 351, 352 S.E.2d 201. A copy of the opinion is attached as

Appendix A. Rehearing was denied by the Court of Appeals of Georgia on December 18, 1986 (Appendix B). Certiorari was denied by the Supreme Court of Georgia in an unpublished order on February 24, 1987 (Appendix C). Rehearing was denied by the Supreme Court of Georgia on March 11, 1987 (Appendix D).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The opinion of the Court of Appeals of Georgia was rendered December 3, 1986, rehearing denied December 18, 1986. Certiorari was denied by the Supreme Court of Georgia on February 24, 1987, rehearing denied March 11, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

It further involves Section 16-11-39(4) of the Official Code of Georgia Annotated which reads in relevant part:

> A person who commits any of the following acts commits a misdemeanor: . . . (4) Telephones another repeatedly, whether or not conversation ensues, for the purpose of annoying, harassing, or molesting another or his family; uses over the telephone language threatening bodily harm; telephones and intentionally fails to hang up to disengage the connection; or knowingly permits any telephone under his control to be used for any purpose prohibited by this subsection.

HOW THE ISSUE WAS RAISED BELOW

The issue in the Question Presented was raised on direct appeal to the Court of Appeals of Georgia and raised in a Petition for Writ of Certiorari filed in the Supreme Court of Georgia.

STATEMENT OF THE CASE

Nathaniel Atchison, a black man with no prior criminal record, who, until his arrest in this case worked as a probation officer

for the State of Georgia, was convicted by an all white jury in the State Court of Troup County, Georgia of making harassing telephone calls to a white woman. He was given the maximum sentence of one year imprisonment.

The State presented no evidence that Nathaniel Atchison made the telephone calls for which he was convicted.

In November of 1985 Yolanda Crews Beckman began receiving harassing telephone calls. The calls occurred on an irregular basis (Tr.T. 11). Ms. Beckman did not recognize the voice of the caller and did not know who was making the calls. (Tr.T. 14). At no time did the State attempt to have Ms. Beckman make either an in-court or out-of-court identification of Petitioner's voice. No testimony was presented that Petitioner made the calls.

Ms. Beckman first reported the harassing telephone calls on December 17,

1985 (Tr.T. 18). On December 31, the telephone company placed a trap on Ms. Beckman's telephone to identify each incoming call by calling number and exact time. (Tr.T. 18). On January 4, 1986, Ms. Beckman received six (6) harassing telephone calls; these occurred at 10:55 a.m., 10:56 a.m., 10:59 a.m., 11:02 a.m., 11:04 a.m. and 11:06 a.m. (Tr.T. 19). According to the trapping equipment placed by the telephone company, these six calls originated from a phone listed in the names of Ms. Robert Hayes and Rebecca Atchison, Petitioner's mother and grandmother. (Tr.T. 19). Petitioner did not live with his mother and grandmother. Petitioner lived in Atlanta, Georgia (Tr.T. 27), some seventy (70) miles from his mother's home in LaGrange, Georgia.

Absolutely no evidence was presented that Petitioner was at his mother's home at the time the calls were made.

Ms. Beckman did not know Petitioner personally although Petitioner's mother babysat for Ms. Beckman many years before when Ms. Beckman was a child. (Tr.T. 11). Ms. Beckman was listed by her name Yolanda Beckman in the telephone directory. (Tr.T. 13-14).

Petitioner stated that he had visited his mother sometime after 2:30 on the afternoon of January 4, but he was not at his mother's home when the phone calls were made that morning. (Tr.T. 35, 9-10).

The evidence also showed that Petitioner has a brother who also lives in Atlanta. (Tr. T. 41).

Petitioner was convicted on March 20, 1986 and sentenced to the maximum sentence of one year imprisonment. On appeal to the Court of Appeals of Georgia, the conviction was affirmed; certiorari was denied by the Supreme Court of Georgia.

REASONS FOR GRANTING THE WRIT

PETITIONER WAS CONVICTED ON EVIDENCE WHOLLY INSUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT. THIS CONVICTION VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). "The standard of proof beyond a reasonable doubt . . . plays a vital role in the American scheme of criminal procedure because it operates to give concrete substance to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." Jackson v. Virginia, 443 U.S. 307, 315 (1979).

In Jackson v. Virginia, supra, this Court established the standard for federal

constitutional review of the sufficiency of evidence in a state criminal proceeding:

> . . . the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
> 443 U.S. at 319.

Viewed in the light most favorable to the State, the evidence presented against Petitioner would only show that the calls were made from Petitioner's mother's home, where Petitioner did not live, between 10:55 a.m. and 11:06 a.m. on January 4. There was no evidence that Petitioner was at his mother's home at that time. Petitioner's mother has at least one other son living in equally close proximity (70 miles) to her home.

This is a case fraught with the possibility that racial prejudice infected the decision making process. A black man accused of making harassing phone calls of a

sexual nature against a white woman was tried before an all white jury and convicted on the most insufficient evidence imaginable.

No rational trier of fact could have concluded that guilt was proven beyond a reasonable doubt from the evidence presented against Nathaniel Atchison.

CONCLUSION

Based on the foregoing, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Atlanta, Georgia 30301
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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

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Dec 3 1986

In the Court of Appeals of Georgia

73154. ATCHISON v. THE STATE

McMurray, Presiding Judge

Defendant was accused of the offense of making "harassing telephone calls," a misdemeanor, in that on January 4, 1986, he used threatening language of "'I'm going to rape you'" in a telephone call to another. A jury convicted defendant of the crime charged. He was sentenced to confinement for a period of 12 months and he appealed. Error is enumerated upon the general grounds and the trial court's charge on the law of circumstantial evidence. Held:

1. The following evidence was adduced upon the trial of the case: The victim

began receiving obscene telephone calls in the fall of 1985. She contacted the authorities and the telephone company and was told that she should keep a log of the telephone calls. The calls were sporadic - "sometimes two or three times a week and then maybe a week [would] go by" - but they continued. Just before the start of the new year, a tracing device was installed on the victim's telephone by the telephone company. The device recorded the time of day calls were received and the telephone number from which calls were made.

On January 4, 1986, the victim received 6 telephone calls within an 11 minute period from 10:55 a.m. to 11:06 a.m. The telephone caller used obscene language and threatened to rape the victim. The calls were traced to a particular telephone number. The number was listed in the names of defendant's mother and grandmother. No men lived in the household; however,

defendant visited his mother about ever other weekend.

Defendant was in his mother's home on January 4, 1986. He admitted that fact. He testified, however, that he did not arrive there until the middle of the afternoon. The time of defendant's arrival was corroborated by defendant's grandmother. She averred that defendant never visited before the mid-afternoon.

The victim did not recognize the voice of the caller. Yet the victim's name was known to the caller as he addressed her by her first name. (The evidence demonstrated, however, that the victim's full name was listed in the telephone book.) The victim knew defendant because his mother"babysat" for her when she was a small child. Defendant denied that he knew the victim but admitted that he did know her years ago.

"'To warrant a conviction on circumstantial evidence, the proved facts

shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.' OCGA §24-4-6. . . . Questions of reasonableness are generally decided by the jury, and this court will not disturb the jury's finding that the evidence was sufficient to exclude every reasonable hypothesis save that of guilt unless the verdict is unsupportable as a matter of law. Harris v. State, 236 Ga. 242 (223 SE2d 643) (1976); Butler v. State, 150 Ga. App. 751 (258 SE2d 691) (1979)." Shockley v. State, 166 Ga. App. 182 (303 SE2d 519). "'The term "hypothesis" as used in (OCGA §24-4-6 (Code Ann. §38-109)) refers to such reasonable inferences as are ordinarily drawn by ordinary men in the light of their experience in everyday life; the Code section does not mean that the act might by bare possibility have been done by somebody else, but that the State should show to a

moral certainty that it was the defendant's act.' Hunter v. State, 91 Ga. App. 136, 138 (85 SE2d 90) (1954); cited in McGee v. State, 159 Ga. App. 763 (285 SE2d 224) (1981). See also Wrisper v. State, 193 Ga. 157 (17 SE2d 714) (1941)." Hopkins v. State, 167 Ga. 811, 815 (307 SE2d 707).

In the case sub judice, an ordinary person in the light of everyday experiences would be authorized to draw from the proven facts the conclusion that it was indeed defendant who made the threatening telephone calls to the victim on the day in question. No other man was shown to have been in the household of defendant's mother on the day in question; no other man was shown to have had access to the telephone from which the calls were made. See Holland v. State, 176 Ga. App. 343 (1) (335 SE2d 739).

Defendant contends that the tracing device might have inaccurately recorded the wrong telephone number. This hypothesis is,

at best, a "bare possibility" which does not hold up in the light of everyday experience.

The evidence was sufficient to enable a rational trier of fact to find defendant guilty of the crime charged beyond a reasonable doubt. See Wade v. State, 162 Ga. App. 189, 190 (290 SE2d 535); Johnson v. State, 176 Ga. App. 378, 380 (5)(336 SE2d 257). The general grounds are without merit.

2. With regard to circumstantial evidence, the trial court charged the jury as follows: "Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may infer other related or connected facts which are reasonable and justified in the light of your own experience. Now, to warrant a conviction on circumstantial evidence alone, the proven facts must not only be consistent with the theory of guilt but must include every other reasonable theory other than the

guilt of the accused. Now, the comparative weight of circumstantial evidence and direct evidence on any given issue is a question of fact for you, the jury, to decide." (emphasis supplied.) No other charge was forthcoming concerning the State's burden to exclude every reasonable hypothesis save guilt. The jury was charged, however, that defendant's guilt must be proved by the State beyond a reasonable doubt.

At the conclusion of the charge, the trial court asked defendant's counsel whether he had any objections. He replied that he did not and no reservation of the right to later object was made. See Jackson v. State, 246 Ga. 459, 460 (271 SE2d 855).

On appeal, defendant asserts the trial court's "slip of the tongue," the use of the word "include" instead of "exclude," was harmful error. We need not determine the merit of defendant's contention because under the circumstances of this case,

defendant's right to raise this issue on appeal was waived. Brown v. State, 171 Ga. App. 70, 71 (318 SE2d 498).

Judgment affirmed. Carley and Pope, JJ., concur.

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, December 18, 1986

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

73154. Nathaniel Atchison v. The State (86S511)

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA FEB 24 1987

Case No. 44244. Atchison v. The State

The Supreme Court today denied the writ of certiorari in this case. All the justices concur, except Smith, J., dissents.

Yours very truly,

JOLINE B. WILLIAMS, Clerk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA MAR 11 1987

The motion for a rehearing was denied:

Case No. 44244. Atchison v. The State

Smith, J. dissents

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk